Public Prosecutor v Selvarajoo a/l Ramachandran & Ors

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42–3 OF 2002(4)
AZAHAR MOHAMED JC
20 JANUARY 2005

Criminal Law — Prevention of Corruption Act 1961 — ss 3(a)(ii), 4(a) — Whether prosecution had proved prima facie case against accused persons

Criminal Procedure — Prosecution — Prosecution's case — Whether made out against accused persons — Whether sessions court judge had erred in not calling for accused persons' defence

Criminal Procedure — Prosecution — Witnesses — Whether prosecution obliged to call witnesses not essential to the unfolding of its case

Evidence — Accomplice — Corruption cases — Whether reluctant givers of bribe accomplices — Whether such witnesses were protected under s 18 of the Prevention of Corruption Act 1961

Evidence — Burden of proof — Prima facie case — Whether made out against accused persons

On 27 August 1997 Indonesians Suroso bin Sukani (PW4) and his wife Siti Fatorna bte Sakur (PW7), were on their way from their home at a construction site to Masai. PW4 was driving a car belonging to one Khairil (PW3). They were stopped by a police patrol car crew on crime prevention rounds. The three respondent police officers got out from the said police patrol car driven by PW6 and proceeded to search the car driven by PW4. They found six Indonesian passports in the booth of the said car. When questioned, PW4 and PW7 were not able to confirm if these passports were genuine or otherwise. The first respondent then drove the said car back to the construction site with the third respondent, PW4 and PW7 in the car. The second respondent got into the police patrol car and followed them to the construction site. Upon reaching the construction site, everyone except for PW6 got out from both the cars. According to PW4 the police insisted that the passports were false and demanded a sum of RM10,000 to 'close the case'. PW4 then explained to them that he did not know that there were passports in the booth as the car and passports belonged to PW3. PW4 then contacted PW3 who then proceeded to the site. According to PW3 when he arrived at the site he saw PW4 with the three respondents. PW3 explained to the respondents that the passports were not false but belonged to his employer who had asked him to apply for work-permits for the passport holders. PW3 said the three respondents refused to believe him and threatened to seize the car and arrest them if the money was not paid. PW3 said that the passports were eventually returned to him after he paid RM4,000. Apparently, PW4 and PW7 had to borrow money

from two friends at the construction site to pay the bribe. These two friends, Sunari and Yantok had returned to Indonesia at the time of the trial. The following day PW3 made a police report to the Anti Corruption Agency ('ACA'). The three respondents were eventually charged with three offences under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 ('the Act'). They were however acquitted and discharged by the sessions court judge at the close of the case for the prosecution on the basis that the prosecution had not made out a *prima facie* case against the respondents. According to the sessions court judge, PW3, PW4 and PW7, were accomplices, and had all played active roles in the corrupt transaction. It was her view that they had fully participated in the negotiations and were willing and prepared to pay the money. They were thus not protected by s 18 of the Act. The judge also ruled that the failure to call Sunari and Yantok as witnesses caused a serious effect in the prosecution's case. Further, the failure of the prosecution to tender the passports caused a serious gap in its case. The prosecution appealed.

Held, allowing the prosecution's appeal, and directing the sessions court to call for the defence:

(1) It was clear that PW3, PW4 and PW7 were not willing participants in giving the money to the respondents. It was clear that they had no choice and that they only finally agreed to pay because of the pressure put on them by the respondents. In the circumstances of this case, faced with the respondents' demand and threat they had little choice but accede to their demands. The witnesses did not offer the bribe but it was the respondents who demanded the money from them. In the circumstances, the witnesses were not accomplices. These were important considerations, which the sessions court judge had failed to direct her attention to. This was thus a serious misdirection by way of non-direction, which occasioned a failure of justice (see para 15).

(2) The sessions court judge had erred in ruling that s 18 of the Act had no application. The witnesses were persons who should not be presumed to be unworthy of credit. The sessions court judge erred in relying upon the case of *Wee Boh Soh v Rex* [1947] MLJ 39 without making any reference to the cases of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379, *Daimon bin Banda v Public Prosecutor* [1951] MLJ 11 and *Mohamed Taufik v Public Prosecutor* [1975] 1 MLJ 36 (see paras 16 and 17); *Wee Boh Soh v Rex* [1947] 13 MLJ 39 not followed.

(3) The evidence of Sunari and Yantok was not essential to the unfolding of the narrative upon which the prosecution was based. A *prima facie* case could be established without their testimony. The prosecution had adduced evidence why it was unable to call those persons as witnesses.

Thus, the sessions court judge had again misdirected herself by ruling that the failure to call Sunari and Yantok as witnesses caused a serious effect in the prosecution's case. As a result of the serious error she had arrived at an erroneous decision (see paras 19 and 20).

(4) The issue of the validity of the passports was not a crucial issue in this case. Whether the respondents actually committed any offence under the passport or the immigration legislations or any other offences under any written laws was irrelevant and not material in this case. It was not an ingredient of any of the three charges. The sessions court judge had therefore misdirected herself in making such an adverse inference (see para 21).

(5) In the instant case, there were no material contradictions or discrepancies in the evidence of the prosecution witnesses which rendered their evidence wholly unreliable. Upon a maximum evaluation and scrutiny of the witnesses, the necessary elements of the three charges against the respondents had been proved. Had the sessions court judge evaluated and scrutinised carefully the whole evidence adduced by the prosecution; and had she subjected the prosecution evidence to a maximum evaluation, she would have decided that a prima facie case had been made out against the respondents. The sessions court judge had therefore erred in law and in fact when she discharged and acquitted the respondents at the close of case for the prosecution without calling for their defence. The appeal by the public prosecutor should be allowed. The order of acquittal and discharge of the respondents ought to be set aside. The learned sessions court judge should be directed to call for the defence of the respondents on all the three charges (see para 24).

Obiter:

It is a rule of practice that it is not safe to convict solely on the evidence of an accomplice unless such evidence is corroborated in material particulars. However, a trial judge is unconstrained, after a maximum evaluation of the evidence of the accomplice, to convict an accused person notwithstanding the absence of corroboration, if he is convinced of the truth of the accomplice's evidence and such evidence is sufficient to show that the prosecution had proved its case beyond reasonable doubt against the accused person (see para 18).

[**Bahasa Malaysia summary**

Pada 27 Ogos 1997 dua warga Indonesia bernama Suroso bin Sukani (PW4) dan isterinya Siti Fatorna bte Sakur (PW7) sedang dalam perjalanan daripada rumah mereka di sebuah tapak pembinaan ke Masai. PW4 memandu sebuah kereta kepunyaan seorang yang bernama Khairil (PW3). Mereka diarahkan

berhenti oleh sebuah kereta patrol polis yang sedang dalam rondaan mencegah jenayah. Tiga pegawai polis iaitu responden-responden keluar daripada kereta patrol polis tersebut yang dipandu oleh PW6 dan memeriksa kereta yang dipandu oleh PW4. Mereka menjumpai enam pasport Indonesia di dalam but kereta tersebut. Apabila disoal, PW4 dan PW7 gagal menentusahkan sama ada pasport tersebut tulen atau tidak. Responden pertama kemudian memandu kereta tersebut kembali ke tapak pembinaan bersama responden ketiga, PW4 dan PW7 di dalam kereta. Responden kedua kembali ke kereta patrol polis dan mengikuti mereka ke tapak pembinaan tersebut. Setelah tiba ke tapak pembinaan tersebut, kesemua mereka kecuali PW6 turun daripada kedua-dua buah kereta tersebut. Menurut PW4, polis mengatakan pasport itu tidak tulen dan meminta untuk jumlah RM10,000 untuk 'menutup kes' itu. PW4 kemudian memberitahu mereka bahawa dia tidak tahu bahawa terdapat pasport di dalam but kerana kereta dan pasport tersebut adalah kepunyaan PW3. PW4 kemudian menghubungi PW3 yang bergegas ke tapak tersebut. Menurut PW3, apabila dia sampai ke tapak tersebut dia melihat PW4 bersama dengan tiga responden tersebut. PW3 menjelaskan kepada responden-responden bahawa pasport tersebut tidak palsu tetapi kepunyaan majikannya yang telah memintanya memohon untuk permit kerja bagi pemegang pasport tersebut. PW3 menyatakan bahawa ketiga-tiga responden tersebut enggan mempercayainya dan mengugut merampas kenderaan tersebut serta menangkap mereka jika wang tersebut tidak dibayar. PW3 menyatakan bahawa pasport-pasport tersebut dipulangkan kepadanya setelah dia membuat bayaran sebanyak RM4000. PW4 dan PW7 terpaksa meminjam wang daripada dua rakan yang lain yang berada di tapak pembinaan tersebut. Kedua kawan tersebut yang bernama Sunari dan Yantok telah pulang ke Indonesia pada masa perbicaraan. Pada hari keesokan, PW3 membuat laporan polis kepada Badan Pencegah Rasuah ('BPR'). Ketiga-tiga responden tersebut kemudian telah dituduh dengan tiga kesalahan di bawah ss 3(a)(ii) dan 4(a) Akta Pencegahan Rasuah 1961 ('Akta tersebut'). Namun, mereka didapati tidak bersalah dan dibebaskan oleh hakim mahkamah sesyen pada akhir kes pendakwa atas sebab pihak pendakwa gagal menunjukkan kes *prima facie* terhadap responden-responden tersebut. Menurut hakim mahkamah sesyen, PW3, PW4 dan PW7 merupakan penyubahat dan telah memainkan peranan aktif dalam transaksi korup tersebut. Adalah merupakan pendapat hakim tersebut bahawa mereka telah mengambil bahagian secara penuh dan telah bersedia membayar wang tersebut secara rela hati. Oleh itu, mereka tidak dilindungi oleh s 18 Akta tersebut. Hakim tersebut juga memutuskan bahawa kegagalan untuk memanggil Sunari dan Yantok sebagai saksi menyebabkan kesan yang serius ke atas kes pendakwa. Seterusnya, kegagalan pihak pendakwa untuk mengemukakan pasport-pasport tersebut sebagai keterangan menyebabkan jurang yang besar di dalam kes pihak pendakwa. Pihak pendakwa membuat rayuan.

Diputuskan, membenarkan rayuan pihak pendakwa dan mengarahkan mahkamah sesyen untuk memanggil pembelaan responden-responden:

(1) Adalah jelas bahawa PW3, PW4 dan PW7 tidak memberi wang tersebut kepada responden-responden secara rela hati. Adalah jelas bahawa mereka tidak mempunyai pilihan lain dan hanya setuju untuk membayar wang tersebut kerana desakan responden-responden. Dalam kes ini, oleh kerana tuntutan dan ugutan responden-responden, mereka tidak mempunyai pilihan lain dan terpaksa akur kepada permintaan responden-responden tersebut. Saksi-saksi tersebut tidak menawar rasuah tersebut tetapi adalah responden-responden yang menuntut wang daripada mereka. Dalam keadaan tersebut, saksi-saksi tersebut bukanlah penyubahat. Inimerupakan pertimbangan penting yang gagal diambil kira oleh hakim mahkamah sesyen. Oleh itu, ini merupakan penyalaharahan yang serius yang mengakibatkan kegagalan keadilan (lihat perenggan 15).

(2) Hakim mahkamah sesyen telah khilaf semasa memutuskan bahawa s 18 Akta tersebut tidak relevan. Saksi-saksi tersebut tidak patut dianggap sebagai orang yang tidak mempunyai kebolehpercayaan. Hakim mahkamah sesyen tersebut telah silap kerana bergantung kepada kes *Wee Boh Soh v Rex* [1947] MLJ 39 tanpa merujuk kepada kes *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379, *Daimon bin Banda v Public Prosecutor* [1951] MLJ 11 dan *Mohamed Taufik v Public Prosecutor* [1975] 1 MLJ 36 (lihat perenggan 16 dan 17); *Wee Boh Soh v Rex* [1947] MLJ 39 tidak diikut.

(3) Keterangan Sunari dan Yantok tidak penting bagi penjelasan fakta kes pendakwa. Kes *prima facie* boleh dicapai tanpa keterangan mereka. Pihak pendakwa telah mengemukakan keterangan yang memberi sebab mengapa saksi-saksi tersebut tidak boleh dipanggil. Oleh itu, hakim mahkamah sesyen telah sekali lagi membuat penyalaharahan dengan memutuskan bahawa kegagalan memanggil Sunari dan Yantok sebagai saksi menyebabkan kesan yang serius terhadap kes pihak pendakwa. Oleh kerana kesilapan tersebut dia telah mencapai keputusan yang salah (lihat perenggan 19 dan 20).

(4) Isu kesahihan pasport tersebut bukanlah merupakan isu yang penting didalam kes ini. Sama ada responden-responden menyalahi mana-mana undang-undang berkenaan pasport dan imigrasi ataupun undang-undang yang lain adalah tidak relevan dan tidak material kepada kes ini. Ianya bukanlah unsur di dalam tiga pertuduhan dalam kes ini. Hakim mahkamah sesyen oleh itu telah membuat penyalaharahan semasa membuat inferens bertentangan tersebut (lihat perenggan 21).

(5) Di dalam kes ini, tidak terdapat penyangkalan yang material ataupun percanggahan di dalam keterangan saksi-saksi pihak pendakwa yang

boleh menyebabkan keterangan mereka tidak benar. Selepas penilaian maksimum dan penelitian rapi ke atas saksi-saksi tersebut, unsur-unsur penting ketiga-tiga tuduhan terhadap responden-responden telah dibuktikan. Jika hakim mahkamah sesyen membuat penilaian dan penelitian rapi ke atas kesemua keterangan yang dikemukakan oleh pihak pendakwa; dan jika dia menilai secara maksimum keterangan pihak pendakwa, dia semestinya memutuskan bahawa kes prima facie telah dicapai terhadap responden-responden. Oleh itu, hakim mahkamah sesyen telah silap dari segi undang-undang dan fakta apabila dia mendapati responden-responden tidak bersalah dan membebaskan mereka pada penutup kes pihak pendakwa tanpa memanggil untuk pembelaan mereka. Rayuan Pendakwaraya dibenarkan. Perintah pembebasan dan pelepasan responden-responden perlu diketepikan. Hakim mahkamah sesyen yang bijaksana perlu diarahkan untuk memanggil untuk pembelaan responden-responden tersebut di atas kesemua tuduhan tersebut (lihat perenggan 24).

Obiter:

Adalah merupakan peraturan amalan bahawa ia adalah tidak selamat menyabitkan seseorang hanya di atas keterangan seorang penyubahat yang lain tanpa menyokong keterangan tersebut dengan butir-butir material yang lain. Namun, hakim perbicaraan tidak dihadkan, setelah membuat penilaian maksimum ke atas keterangan penyubahat tersebut, untuk mensabitkan seorang tertuduh walaupun tiada keterangan yang menyokong jika dia pasti akan kebenaran keterangan penyubahat tersebut dan keterangan tersebut cukup bagi menunjukkan bahawa pihak pendakwa telah membuktikan kes mereka melampaui keraguan yang munasabah terhadap yang tertuduh (lihat perenggan 18).]

Notes

For a case on prima facie case, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 507.

For cases on accomplice in corruption cases, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 39–45.

For cases on prosecution witnesses, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2834–2836.

For cases on prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2807–2808.

For cases on ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2620–2622.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Daimon bin Banda v PP [1951] MLJ 11 (refd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Mohamed Taufik v PP [1975] 1 MLJ 36 (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379 (refd)
Wee Boh Soh v Rex [1947] MLJ 39 (not folld)

Legislation referred to

Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a), 18

Appeal from: Arrest Case No 61–5 of 1998, (Sessions Court, Johor Bahru)

Vinoben Mathiavaranam (Gana Muthusamy & Co) for the respondents.
Kho Kheng Fuei (Deputy Public Prosecutor) (Anti Corruption Agency Malaysia) for the appellant.

Azahar Mohamed JC:

[1] This appeal arose out of three charges under s 3(a)(ii) and s 4(a) of the Prevention of Corruption Act 1961 ('the Act') for which the three respondents were acquitted and discharged by the learned sessions court judge on 26October 2001 at the close of the case for the prosecution. The learned sessions court judge found that the prosecution had not made out a prima facie case against the respondents. It is against this decision that the public prosecutor has filed this appeal. The respondents were police personnel attached to Ibu Pejabat Polis Daerah, Johore Bahru. The respondents were charged with the following offences and tried jointly:

[2] First Charge:

> Bahawa kamu bersama-sama pada 27 Ogos 1997, di antara jam 9.30mlm hingga 10.30mlm, di tapak projek perumahan Taman Sri Alam Masai, dalam Daerah Johor Bahru Tengah, dalam Negeri Johor sebagai agen-agen Kerajaan Malaysia iaitu Koperal 103713 Selvarajoo a/l Ramachandran, Koperal 88450 Chandran a/l Krishnan dan Lan Koperal 100164 Rasindran a/l Karuppiah telah secara rasuah memujuk rayu untuk diri kamu satu suapan, iaitu wang tunai RM10,000 daripada Suroso bin Sukani sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsip kamu, iaitu tidak mengambil tindakan ke atas Suroso bin Sukani yang dikatakan memiliki enam pasport rakyat Indonesia yang disyaki palsu serta melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah s3(a)(ii) Akta Pencegah Rasuah 1961 yang boleh dihukum dibawah s 3 Akta yang sama.

[3] Second Charge:

> Bahawa kamu bersama-sama pada 27 Ogos 1997, pada jam 11mlm, di tapak projek perumahan Taman Sri Alam Masai, dalam Negeri Johor, sebagai agen-agen Kerajaan Malaysia iaitu Koperal 103713 Selvarajoo a/l Ramachandran, Koperal 88450 Chandran a/l Krishnan dan Lan Koperal 100164 Rasindran a/l Karuppiah telah secara rasuah menerima untuk diri kamu satu suapan, iaitu wang tunai RM1000 daripada Khairul Anam bin Mohd Toha sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsip kamu, iaitu tidak mengambil tindakan ke atas Khairul Anam bin Mohd Toha yang dikatakan memiliki enam pasport rakyat Indonesia yang disyaki palsu dan melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah s4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah seksyen yang sama.

[4] Third Charge:

> Bahawa kamu bersama-sama pada 27 Ogos 1997, pada jam 11mlm, di tapak projek perumahan Taman Sri Alam Masai, dalam Negeri Johor, sebagai agen-agen Kerajaan Malaysia iaitu Koperal 103713 Selvarajoo a/l Ramachandran, Koperal 88450 Chandran a/l Krishnan dan Lan Koperal 100164 Rasindran a/l Karuppiah telah secara rasuah menerima untuk diri kamu satu suapan, iaitu wang tunai RM3000 daripada Khairul Suroso bin Sukani sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsip kamu, iaitu tidak mengambil tindakan ke atas Suroso bin Sukani yang dikatakan memiliki enam pasport rakyat Indonesia yang disyaki palsu dan melindungi mereka, dan dengan itu kamu telah melakukan satu kesalahan di bawah s4(a) Akta Pencegah Rasuah 1961 yang boleh dihukum di bawah seksyen yang sama.

[5] It is the case for the prosecution that at about 9.40pm on 27 August 1997 Suroso bin Sukani (PW 4) and his wife Siti Fatorna bte Sakur (PW 7), both Indonesian citizens, left their home, which was a rumah kongsi at a construction site at Taman Sri Alam to go to Masai, a town not far from their home. They left in a Honda Civic belonging to Khairil (PW3). Earlier that evening PW 4 had exchanged his car with PW3 who was his cousin. A few minutes later, they noticed a police patrol car in the vicinity. Their car was stopped and the three respondents got out from the said police car. The respondents were on crime prevention rounds together with Cpl Abdul Nasir (PW6), — the driver of the police patrol car. The three respondents searched the Honda Civic driven by PW4. They found six Indonesian passports (SPLP)

in the booth of the said car. When questioned, PW4 and PW 7 were not able to confirm if these passports were genuine or otherwise, whereupon the first respondent got into the driver seat of the Honda Civic and drove it back to the construction site at Taman Sri Alam, with the third respondent, PW4 and PW7 in the car. The second respondent got into the police patrol car and followed them to the construction site. Upon reaching the construction site, everyone except for PW6 got out from both the cars. According to PW4 and PW 7, at this juncture all the respondents told him that the passports were false and demanded a sum of RM10,000 to close the case. PW4 then explained to them that he did not know that there were passports in the booth as the Honda Civic and passports belonged to PW3. PW4 was then allowed to use his hand phone to contact PW3. PW4 managed to contact PW3 and urged him to return immediately to the construction site. PW3 reached the scene about half an hour later. According to PW 3 when he arrived at the site he saw PW4 with the three respondents. PW4 explained to PW3 what had transpired earlier and requested him to deal directly with the three respondents. PW3 explained to them that the passports were not false but belonged to his employer who had asked him to apply for work-permits for the passport holders. PW3 said the three respondents refused to believe him and threatened to seize the cars and arrest them if the money was not paid. PW3 said that the passports were eventually returned to him after the payment of RM4000 to the respondents. The following day PW3 made a police report to the Anti Corruption Agency ('ACA'). ACA officers picked up the next day the three respondents. I should perhaps mention here that in the course of PW6' s evidence, the prosecution applied to have him declared as a hostile witness. This application was made, as there was contradiction in his evidence in examination-in-chief and his statement to the ACA as regards firstly, whether there was any discussion between the three respondents and PW 3 at the construction site; secondly, as regards whether on the way back to the police station he was given RM50 notes by the third respondent. The learned session court judge allowed the application in view of the aforesaid contradictions.

[6] What I have set out a moment ago, I think, forms a fair summary of the case for the prosecution upon which each ingredient of the three charges must be established in order to make out a *prima facie* case against the respondents.

[7] Although the learned DPP has 10 grounds in his petition of appeal, I think the critical issue, which requires determination in this appeal revolves around the question whether or not in the circumstances of this case PW3, PW4 and PW7, were accomplices, which are grounds 3.2, and 3.4. The learned sessions court judge in her grounds of judgment was of the view that all the three witnesses had played an active role in the corrupt transaction. It was her view that they had fully participated in the negotiations and were willing and prepared to pay the money. She placed heavy reliance on the case of *Wee Boh*

Soh v Rex [1947] MLJ 39 to hold that these three witnesses were accomplices and thus, s 18 of the Act did not protect them.

[8] In my view, the answer as to whether these witnesses were accomplices or not lies in the judgment of Salleh Abas CJ (Malaya) (as His Lordship then was) in the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379, where His Lordship speaking for the Federal Court said at p 382:

> To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as *particeps criminis*. This means that just as the giver as a principal offender requires mens rea, so does an accomplice witness who received the gratification. If he received gratification innocently or without any corrupt motive or if he did not received it at all, although it was given to him, asfar as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention, *Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary tp the basic concept of criminal liability*. (Emphasis added.)

[9] In *Mohamed Taufik v Public Prosectuor* [1975] 1 MLJ 36, Abdul Hamid J (as His Lordship then was) stated much to the same effect at p 38:

> In the instant case although the learned President had not made any finding whether Wong was an accomplice, I do not think it can be seriously argued that, in regard to the first charge, Wong was an accomplice. Faced with the appellant's demand for $1000 and considering the fact that the appellant had not for a moment left Wong's company until Wong handed part of the amounts solicited, it is quite apparent that Wong had no alternative whatever but to raise the money asked for by the appellant and indeed he handed to the appellant every cent that he managed to raise. Wong had not played any active part in the transaction. He made no offer to bribe the appellant and evidently had no opportunity to report the matter to any one.

[10] And further down, His Lordship said:

> On the basis that the witness is not an accomplice, it is therefore view that the learned President's failure to warn himself of the danger of convicting on the uncorroborated evidence of an accomplice cannot be said to constitute a valid ground sufficient to quash the conviction.

[11] It is therefore necessary for me to scrutinise carefully the manner and the circumstances in which these witnesses gave the money to the respondents. In this regard, PW3 in his testimony said:

> Suroso dan isterinya beritahu polis kata barang yang saya bawa adalah palsu — iaitu pasport. Polis juga ada di sana. Saya jawap pada ketiga polis pasport tak palsu. Saya kata ini pasport pekerja yang saya bawa-adalah sah. Ada seorang polis kata

kalau tak dapat bayar duit kepada kita orang, kereta saya dan kereta Suroso, saya dan isteri akan di tangkap dan kereta di tahan.

Selepas itu jadi tawar menawar duit. Dia kata satu pasport RM10,000. Lalu kita sanggup bayarnya dan saya minta tidak dikenakan apa-apa tindakan terhadap saya. Saya kata pasport ini adalah betul. Saya cuba merayu untuk dilepaskan tetapi gagal. Ketiga-tiga anggota polis kata tidak boleh. Lepas itu polis meminta RM10,000 untuk semua pasport. Saya menolak dan cuba merayu lagi untuk dibebaskan tanpa apa-apa.

Lepas itu ketiga-tiga polis minta RM5000 untuk semua pasport dan saya menolaknya. Saya merayu dilepaskan tanpa sebarang apa-apa lagi. Polis kata RM4000 untuk semua pasport dan memaksa saya membayar dia iaitu ketiga-tiga. Kita cuba merayu lagi untuk tidak dikenakan wang begitu kerana masa ini saya tak memiliki wang. Polis kata kalau kita tak bayar RM4000 saya dan saudara dan kereta akan ditangkap. Mereka memaksa kita bayar pada waktu itu juga.

[12] With regard to the manner and the circumstances in which the money was demanded and paid, PW4 explained:

Lepas itu polis itu gertak saya dan mahu bawa saya ke balai polis. Saya dan isteri ada masa itu. Mereka kata itu pasport palsu. Saya kata ini barang bukan saya, milik SP3.

[13] Continuing with his evidence, this is what PW4 said:

Polis minta duit RM10,000. Ketiga-tiga minta duit. Mereka kata passport palsu. Duit ini untuk tutup kes, OKT juga ada bersama. Saya beritahu tiada wang RM10,000. Saya juga kata ini barang bukan saya tapi milik SP3.

[14] In this regard, the material part of the evidence of PW 7 goes this way:

Mereka check kereta belakang kereta. Mereka keluarkan SPLP dari bonet kereta. Ketiga-tiga OKT keluarkan SPLP. Mereka kata SPLP palsu. Ada enam SPLP.

Suami kata ini bukan kami punya — ini kepunyaan Khairil Anam. Ketiga-tiga kata kerana SPLP palsu-runding-minta RM10,000 untuk tutup kes. Lepas itu suami cakap ini bukan saya punya. Ini kereta bukan saya punya kita pinjam dari Khairil. Suami telefon Khairil suruh datang dengan telefon tangan.

[15] After scrutinising all their evidence in its proper perspective and in the appropriate context, it is clear to me that PW3, PW4 and PW7 were not willing participants in giving the money to the respondents. It is clear to me that they had no choice and that they only finally agreed to pay because of the pressure put on them by the respondents. In the circumstances of this case, faced with the respondents' demand and threat they had little choice but accede to their demand. To my mind, these witnesses did not offer the bribe but it was the respondents who took the initiative by demanding the money from them. In the circumstances, I am of the view that these witnesses were not accomplices. In my view, these are important considerations, which the learned sessions court judge ought to have taken into consideration. Nowhere in

her grounds of judgment did the learned sessions court judge direct her attention to this point. This is a serious misdirection by way of non-direction, which has occasioned a failure of justice. The learned sessions court judgewas in serious error to ignore and to overlook the evidence that I have adverted to earlier, and as the result of the error she had arrived at a wrong decision having regard to the entire evidence.

[16] This brings me to the ruling of the learned sessions court judge that s 18 of the Act did not protect PW3, PW4 and PW7. A moment ago I have said that these witnesses were not accomplices; it therefore follows that these witnesses should not be presumed to be unworthy of credit because it was not these witnesses who in the first place offered them. In *Daimon bin Banda v Public Prosector* [1951] MLJ 11, Taylor J said at p 11:

> The effect of the new provision is that in corruption cases the mere fact that a man has made an improper payment is not by itself enough to brand the man as a person whose evidence, if uncorroborated, is probably untrustworthy. If the man has taken part in the transaction in such a way as to show that, apart from the bare payment, he was an accomplice, then the ordinary rule applies.

[17] The learned sessions court had therefore erred in making the ruling that s 18 of the Act has no application. These witnesses were persons who should not be presumed to be unworthy of credit. And in this regard for the reasons that I have stated above, I am of the view of the view that the learned sessions court judge was in serious error when she relied on the case of *Wee Boo Soh v Rex* without making any reference to the cases of *Ng Kok Lian*, *Daimon* and *Mohamed Taufik*.

[18] While on the issue of accomplice, the learned DPP also argued that the learned sessions court judge erred in law and fact when she failed to rule that even though PW3, PW4 and PW7 were accomplices, the court could still convict the respondents based only on their uncorroborated evidence. In view of what I have said just now that these witnesses were not accomplices, strictly it is not necessary for me to deal with this issue but I would like to say something about it. The law relating to accomplice's evidence is well established. It is this. It is a rule of practice that it is not safe to convict solely on such evidence unless the accomplice evidence is corroborated in material particulars. However, a trial judge is unconstrained, after maximum evaluation of the evidence of the accomplice, convict an accused person if without corroboration he is convinced of the truth of such evidence and that it is sufficient to show that the prosecution has proved its case beyond reasonable doubt against the accused person.

[19] In her grounds, the learned sessions court judge also ruled that the failure to call Sunari and Yantok as witnesses caused a serious effect in the prosecution's case. When PW4 was asked about Sunari and Yantok, he explained it in this way:

Saya dan isteri jumpa Sunari dan pinjam RM2500 darinya. Dia tinggal di Kongsi Sri Alam. Sekarang dia sudah balik kampung di Surabaya. Saya dapat RM2500 dari Sunari. Dapat lagi RM500 dari isteri saya — dia pinjam dari kawan saya — Yantok. Dia sudah balik Indonesia sekarang. Duit RM3,000 saya beri polis OKT1. Dia kira duit dengan OKT2 dan OKT3 — tiga-tiga kira duit.

[20] Looking at the facts of the present case it is my view that the evidence of these two witnesses are not essential to the unfolding of the narrative on which the prosecution is based; a *prima facie* case can be established without their testimony. The prosecution has adduced evidence why they were unable to call him. Thus, the learned sessions court judge had again misdirected herself on this matter and as the result of the serious error she had arrived at an erroneous decision.

[21] The learned sessions court judge also ruled that the failure of the prosecution to tender the passports caused a serious gap in the prosecution's case. In my view the issue of the validity of the passport is not a crucial issue in this matter. In this regard whether the respondents actually committed any offence under the passport or the immigration legislations or any other offences under any written laws is irrelevant and not material in this case; it is not an ingredient of any of the three charges. It therefore follows that the learned sessions court judge had misdirected herself in making such an adverse inference.

[22] I think it is appropriate at this stage that I deal with the submission of the learned counsel for the respondents on the cautioned statements of the respondents, which are exculpatory in nature. It was argued that these statements showed that the respondents were not guilty of any offences and that they raised a reasonable doubt as to their guilt. In this regard, His Lordship Augustine Paul JCA speaking for the Federal Court recently in the case of *Balachandran v PP* [2005] 2 MLJ 301 said:

It is settled law that an exculpatory statement cannot form the basis of an order in favor of an accused person at the close of the case for the prosecution as the accused, not having given evidence at that stage, cannot rely on the statement without it having been tested by cross examination.

[23] Now, I am guided by the established principle that in an appeal against acquittal, the powers of the High Court are as wide as in appeals from conviction. An appellate court may reverse an order of acquittal even if such acquittal is founded on the findings of facts by the trial court if the so-called finding of facts suffer from serious error or the decision is against the weight of evidence and in the process of arriving at the conclusion of fact the trial misdirected itself as to the law. However, I should and will always give proper consideration to the following. Firstly, the presumption of innocence in favor of the respondents and, secondly as an appellate judge I should be very slow

in disturbing a finding of fact arrived at by a trial judge who had the advantage of seeing and hearing the witness.

[24] I have already said earlier that there has been misdirection by the learned sessions court judge to herself as to certain aspect of the evidence and the law relating to accomplices. This serious misdirection is of itself a sufficient ground to justify interference of the decision of the learned sessions court judge. I have evaluated carefully the evidence of the prosecution to the maximum and I have also scrutinised carefully the entire evidence contained in the appeal record. In this respect, I think it is important to keep in mind that in most cases, as in the present case, there are bound to be some form of discrepancies and contradictions in the testimonies of witnesses. Such discrepancies and contradictions only become fatal if the testimonies are entirely unreliable for the reason that the witnesses' testimonies on vital and significant matter are so irreconcilable. Further, there is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. In the case at hand, I do not detect any material contradictions or discrepancies in the evidence of these witnesses, which render their evidence wholly unreliable. In my judgment, upon such evaluation and scrutiny of these witnesses as I have said a moment ago, the following facts have been proved. In regard to the first charge under s 3(a)(ii) of the Act, it is not disputed that the respondents were the agents of the government of Malaysia. Based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had solicited gratification from PW4 as an inducement to the respondents not to initiate action against PW4 who was alleged to have in his possession six forged Indonesian citizen passports and for sheltering them. In regard to the second charge under s 4(a) of the Act, based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had accepted gratification, a sum of RM1000 from PW3 as an inducement to refrain them from taking action against PW3 for an alleged offence of possession of six forged Indonesian citizens passports and for sheltering them. In regard to the third charge under s 4(a) of the Act, based on the evidence of PW3, PW4 and PW7 it has been proved that all the respondents had accepted gratification, a sum of RM3000 from PW4 as an inducement to refrain them from taking action against PW4 for an alleged offence of possession of six forged Indonesian citizen passports and for sheltering them.

[25] Had the learned sessions court judge evaluated and scrutinised carefully the whole evidence adduced by the prosecution and subject the prosecution evidence to maximum evaluation, she would have decided that a *prima facie*, case had been made out in line with the guideline laid down by the Court of Appeal in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and the recent Federal Court in *Balachandran v Public Prosecutor*. In the circumstances of this case and taking into consideration all the evidence adduced in its entirety, it is my judgment that the learned session court judge erred in law

and in fact when she discharged and acquitted the respondents at the close of case for the prosecution without calling for their defense. Accordingly, I would allow the appeal by the public prosecutor and I hereby set aside the order of acquittal and discharge of the respondents and I further hereby direct the learned session court judge to call for the defence of the respondents on all the three charges. The respondents will appear for mention before the sessions court on 27 January 2005 to fix a date for the continued hearing of the matter until its conclusion before the same learned sessions court judge. They are allowed bail, each in the sum of RM2000 in one surety.

Prosecution's appeal allowed. Sessions court directed to call for the defence.

Reported by John Paul Simon